

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 777-7763

June 18, 2002

ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W. – Suite TW-A325
Washington, D.C. 20554


Re: *Written Ex Parte Presentation*
In the Matter of Performance Measurements and Standards for
Interstate
Special Access Services, CC Docket No. 01-321

Dear Ms. Dortch:

On June 18, 2002, the Joint Competitive Industry Group submitted a written *ex parte* presentation to Chairman Powell, urging the Commission to adopt an enforcement plan providing remedies for poor or discriminatory special access provisioning and maintenance by Tier 1/Class A incumbent local exchange carriers.

Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,


Ruth Milkman

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Dorothy Attwood
Jeffrey Carlisle
Michelle Carey
John Stanley
Uzoma Onyeije

June 18, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W., Suite TW-A325
Washington, D.C. 20554

Re: Joint Competitive Industry Group Proposal Regarding
Special Access Provisioning Remedies

Dear Chairman Powell:

On February 12, the undersigned competitive telecommunications carriers, trade associations and user groups (the "Joint Competitive Industry Group") wrote to you, urging that the Commission adopt performance measures, performance standards, and reporting requirements to govern the provision of special access services by incumbent local exchange carriers. The Joint Competitive Industry Group also noted that the Commission should be prepared to take swift, effective and certain enforcement action, and offered "Essential Elements of a Special Access Provisioning Enforcement Plan," a unified competitive industry and user group view regarding remedies for poor or discriminatory special access provisioning.

The Joint Competitive Industry Group continues to support that plan, and writes today to amplify the discussion of two points of the Enforcement Plan, Point 6 (Payments to Customers) and Point 8 (Forfeitures). The Commission can promote swift, effective and certain enforcement by providing for: (1) service credits; (2) an expedited complaint process; and (3) a streamlined forfeiture process; as described in Attachment A to this letter. The proposals contained in Attachment A do not affect a customer's right under the statute to seek damages or injunctive relief either at the Commission or in federal court or to pursue any other private remedy.

The three proposals (service credits, expedited complaint process, and streamlined forfeiture process) are complementary. Service credits and complaints would result in payments to individual customers, while the forfeiture process would result in payment to the U.S. Treasury. Service credits are designed to ensure that customers do not pay the full price for substandard special access service. If the customer's damages exceed the amount of the service credit, the customer may use the expedited complaint process to collect damages quickly and without extensive litigation costs. The expedited complaint process is designed to provide swift and sure compensation for customers, based on information from the carrier itself. The streamlined forfeiture process is intended to penalize incumbent LECs for violations of the Communications Act, and to enhance their incentives to provision special access in a reasonable and non-discriminatory manner. As explained in our February 12 proposal, the Joint Competitive Industry Group believes these measures could reasonably be limited to only Tier 1 incumbent LECs, and not applied to smaller incumbent LECs.

The Joint Competitive Industry Group urges the Commission to adopt the Group's proposal regarding remedies, as well as its proposed performance measures, performance standards and reporting requirements.

Sincerely,

The Joint Competitive Industry Group

Douglas Jarrett
Keller & Heckman
American Petroleum Institute

Richard J. Metzger
Vice President – Regulatory and Public Policy
Focal Communications Corporation

John Windhausen, Jr.
President
Association for Local Telecommunications Services

Jake E. Jennings
Vice President – Regulatory Affairs
NewSouth Communications

Robert W. Quinn, Jr.
Federal Government Affairs Vice President
AT&T Corp.

Kelsi Reeves
Vice President – Federal Government Relations
Time Warner Telecom

Audrey Wright
Director, Domestic Regulatory Affairs
Cable & Wireless

Donna Sorgi
Vice President, Federal Advocacy Law and Public Policy
WorldCom, Inc.

H. Russell Frisby, Jr.
President
Competitive Telecommunications Association

R. Gerard Salemmme
Senior Vice President, External Affairs
XO Communications, Inc

Brian Moir
General Counsel
Ecommerce & Telecommunications Users Group

Attachment

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin

Dorothy Attwood
Jeffrey Carlisle
Michelle Carey

John Stanley
Marlene Dortch
Uzoma Onyeije

ATTACHMENT A

Joint Competitive Industry Group Proposal

Payments to Customers of Incumbent LECs And Forfeitures

Payments to Customers of Incumbent LECs

- Payments would take the form of service credits, damages, or both.

Service Credits

- Service credits are designed to ensure that customers do not pay full price for substandard service.
- Section 205 gives the Commission broad authority to compel incumbent LECs to incorporate automatic service credits for poor or discriminatory performance into their interstate special access tariffs and their carrier-to-carrier special access contracts.
- To avoid the prolonged process of suspending and investigating each incumbent LEC tariff after it is filed, the Commission should establish the specific terms that incumbent LECs must include in their tariffs and contracts.
- The tariff and contract terms prescribed by the Commission would correspond to the measures, standards, disaggregation levels, and exclusions set forth in the JCIG Proposal.
- At a minimum, for each measure in the JCIG Proposal, the tariff or contract term should take into consideration:
 - (for measures with a parity standard) how the credit will be calculated, with the level of credit escalating based upon the relationship between the incumbent LEC's performance for the customer versus the incumbent LEC's performance to itself, its affiliates, or its retail customers (*e.g.*, a credit equal to X for performance that is Y worse than parity with the incumbent LEC's retail performance, with X increasing as Y increases); or
 - (for measures with a benchmark standard) how the credit will be calculated, with the level of credit escalating based upon the degree of deviation between the incumbent LEC's performance and the established benchmark (*e.g.*, a credit equal to X for performance that is Y worse than the benchmark, with X increasing as Y increases)
- Depending on the metric, the credit would be applied against the recurring or non-recurring charge, as appropriate, for the particular reporting period.
- The credit would be applied separately to each disaggregated service level (*e.g.*, DS0, DS1, etc.) for each measure as reported by the incumbent LEC.

- No matter how many separate standards were violated, the cumulative credit applicable to any given facility or service would be no more than 100% of the tariffed or contract charge for that facility or service.

Expedited Complaint Process

- The expedited complaint process is intended to compensate customers for damages incurred, without involving extensive litigation costs.
- Performance standards or parity benchmarks that an incumbent LEC misses for services provided to an individual customer would be flagged in customer-specific reports.

Liability Phase

- In the liability phase, a customer would file a form complaint with the FCC specifying the incumbent LEC at issue; the month during which the violation occurred; the performance standard or parity benchmark that was missed; and the number of circuits involved.
 - The customer would serve the complaint simultaneously on the incumbent LEC and the Commission.
 - The incumbent LEC would have 10 days to answer.
 - The customer would have 7 days to respond to the incumbent LEC's answer.
 - Identification of a missed performance standard or benchmark would establish a rebuttable presumption that a violation of the Act and/or the Commission's rules has occurred. This rebuttable presumption would shift the burden of production to the incumbent LEC to demonstrate that it has not violated the statute or the Commission's rules.
 - The incumbent LEC would bear the heavy burden of submitting evidence sufficient to overcome the rebuttable presumption and avoid a finding of liability.
 - Absent a *force majeure* event shown to have *caused* the incumbent LEC to miss the benchmark standard or parity standard, the Commission would find that the incumbent LEC has violated the Commission's rules and the statute.
 - The Commission would issue an order resolving the liability issue within 30 days of the incumbent LEC's answer.

Damages Phase

- Once the incumbent LEC's liability has been established, the customer would file a statement of damages, based either on its own calculations or as defined by a proxy schedule developed by the Commission.
- The incumbent LEC would have a brief opportunity to comment on the statement of damages.

- The Commission would award damages promptly.
- If appropriate, the amount of the damages the incumbent LEC is required to pay would be reduced by the amount of service credits the customer previously received.

Forfeitures

- The forfeiture process is intended to penalize incumbent LECs and to enhance their incentives to provision special access in a reasonable and nondiscriminatory manner.

Streamlined Forfeiture Process

- Incumbent LECs would provide aggregate and customer-specific monthly performance reports.
 - Aggregate reports would indicate whether any benchmark standards or parity standards have been missed for any class of customer (*e.g.*, provisioning for unaffiliated IXC is slower than for affiliated IXCs).
- If one or more metrics have been missed, the Commission, within 7 days, would automatically issue a notice of apparent liability (“NAL”) and an order to show cause.
 - The NAL would identify each missed standard and each instance of discriminatory treatment both by class of customers and by circuit type.
 - The NAL also would propose a specific penalty for each missed standard.
 - The order to show cause would direct the incumbent LEC to demonstrate why: (a) the Commission should not find that the incumbent LEC has violated the Commission’s rules and the statute; and (b) the incumbent LEC should not be required to come into compliance with the Commission’s performance requirements within 30 days.
- The incumbent LEC would have 15 days to respond to the NAL, and customers would have 7 days to comment on the incumbent LEC’s response.
- The incumbent LEC would bear the burden of demonstrating by clear and convincing evidence that its poor or unreasonably discriminatory performance was justified.
 - Absent a *force majeure* event shown to have *caused* the incumbent LEC to miss the benchmark standard or parity standard, the Commission would find that the incumbent LEC has violated the Commission’s rules and the statute.
- Within 30 days of the incumbent LEC’s response to the NAL, if the incumbent LEC has not been able to overcome the presumption of liability with clear and convincing evidence of justification, the Commission would issue an order finding that the incumbent LEC has violated the Commission’s rules and the Communications Act, and that it must pay the prescribed forfeiture to the U.S. Treasury.